IN THE

Supreme Court of the United States

OCTOBER TERM 1978-79

No. 78-1817

FORD MOTOR CREDIT COMPANY, *Petitioner,*

v.

COLONIAL FORD, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY OF FORD MOTOR CREDIT COMPANY

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August 16, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY OF FORD MOTOR CREDIT COMPANY

At the conclusion of its Brief in Opposition, Respondent Colonial Ford, Inc. ("Colonial") addresses the key question raised by the Tenth Circuit's decision below: Does every contract between any affiliate of an automobile manufacturer and an automobile dealer constitute a *franchise* agreement subject to the special standards of the Automobile Dealer's Franchise Act? 15 U.S.C. §§ 1221-25 (1976).

Colonial contends that every such agreement between an affiliate of a manufacturer and a dealer is subject to the Act. *See Brief in Opp.* at 22-24.

Ford Credit submits that the Act is much more limited in scope and applies only to the core franchise relationship—the agreement by which a manufacturer supplies its dealer with automobiles. The Tenth Circuit's extension of the Act to non-franchise arrangements conflicts with the clear terms of the statute, its legislative history, and the decisions of every other court of appeals which has considered the question. Unless a Writ of Certiorari issues, non-automotive affiliates of automobile manufacturers will be subjected to discriminatory and anti-competitive treatment; and a whole new species of federal question commercial litigation will be created, adding to the burdens on the federal courts.

1. The Controlling Facts Are Not In Dispute.

The facts which govern the decision below, and the issues now before the Court, are undisputed. In 1969, Colonial entered into a franchise agreement with Ford Motor which provided for the sales of Ford automobiles by Colonial. Ford Motor was at all times directly responsible to Colonial for its obligations under that franchise agreement. Indeed, in the companion case before this Court, Colonial strenuously argues that the jury was correct in holding Ford Motor liable for breaching its franchise obligations under the special, strict standards of the Franchise Act.[1]

Ford Credit was not a party, and never became a party, to that Ford Motor-Colonial franchise agreement. Indeed, Colonial operated under its franchise

[1] *Ford Motor Co.* v. *Colonial Ford Inc.*, No. 78-1818. It should be emphasized that Ford Motor does not dispute that the Franchise Act governs the performance of its franchise agreement with Colonial.

from Ford Motor for a number of years without any credit arrangement with Ford Credit.

In its brief, Colonial repeats its owner's allegations that Ford Motor and Ford Credit conspired to coerce Colonial to use Ford Credit's financial services. *Brief in Opp.* at 5-9. These allegations, however, are simply not relevant to the issues before the Court. Suffice it to say, Colonial's charges were refuted by ample evidence in the record and were rejected by the jury which held for both Ford Motor and Ford Credit on Colonial's antitrust conspiracy claim. The jury's findings on this point were in no way altered by the Tenth Circuit's decision.

Similarly irrelevant is Colonial's speculation as to what the facts *might have been* if the antitrust laws and Ford Motor's antitrust consent decree [2] did not exist, and if Ford Motor had incorporated some credit relationship with Colonial in the franchise agreement. *Brief in Opp.* at 12-13. The facts are that Ford Motor's franchise agreement with Colonial was separate from, and independent of, Ford Credit's financing agreement with Colonial; and that Colonial did business for a number of years with a franchise agreement with Ford Motor but without any financial arrangement with Ford Credit.

2. The Franchise Act Does Not Apply To Every Agreement Between An Automobile Dealer And An Affiliate Of An Automobile Manufacturer.

Colonial's contention that any agreement between an automobile dealer and any affiliate of an automobile

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[2] See *United States* v. *Ford Motor Co.*, 1952-54 Trade Cas. (CCH) ¶ 67,437 (N.D. Ind. 1953) discussed in Ford Credit's Petition at 24-25.

manufacturer constitutes a "franchise" subject to the special standards of the Franchise Act must be rejected for a number of reasons.

First, Congress clearly did not intend the Act to apply to every arrangement between a dealer and its manufacturer. During the floor debate on the bill which ultimately became the Act, the Senate eliminated language which would have expanded the Act's coverage to "all dealings or transactions" between a manufacturer and its dealers. S.3879, 84th Cong., 2d Sess. § 2 (1956). As one commentator has noted, the Franchise Act was "not designed to apply to the entire relationship between the manufacturer and dealer, but only to that part of their relationship governed by the written franchise." Note, *Statutory Regulation of Manufacturer-Dealer Relationships in the Automobile Industry,* 70 Harv. L. Rev. 1239, 1246-47 (1957).

Second, Colonial's contention that there can be a multitude of "franchises" between a manufacturer and a particular dealer conflicts with the clear terms of the Act. The Act defines the term "franchise" in the singular: "*the written agreement or contract* between any automobile manufacturer . . . and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such *agreement or contract.*" 15 U.S.C. § 1221(b). (Emphasis added.) If Congress had intended the Act to apply to *all* commercial relationships between affiliates of automobile manufacturers and dealers, it would have used the plural; it would have defined "franchise" to mean "*all* written agreements . . ." or "*any* written agreements . . . ."

Third, Colonial's excessively broad reading of the Act conflicts with the consistent rulings of every court

which had previously been asked to extend the Act beyond the core manufacturer-dealer relationship. Prior to the Tenth Circuit's decision below, no court had ever held that a credit subsidiary of an automobile manufacturer was subject to the Franchise Act with respect to its financial arrangements with a dealer.[3] The only court that appears to have ruled precisely on the question held that the credit arrangements between a financial subsidiary of an automobile manufacturer and one of the manufacturer's dealers are *not* governed by the Act. In *Chumbley* v. *General Motors Corp.*, Civil No. 6-71125 (E.D. Mich. Sept. 19, 1977),[4] the court reviewed the legislative history of the Franchise Act and concluded that Congress did not intend it to apply to such financial arrangements. The court noted that although one of the bills which ultimately led to the Franchise Act would have applied to the "financing [of] motor vehicles intended for resale,"[5] that language was not included in the Act when it was ultimately adopted. Emphasizing that the re-

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[3] Colonial mistakenly suggests that the Fifth Circuit applied the Franchise Act to a credit subsidiary in *York Chrysler-Plymouth, Inc.* v. *Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971). As the court of appeals noted, Chrysler's credit subsidiary was not even a defendant in the dealer's action against Chrysler and its marketing subsidiary. *Id.* at 792, n.6. The court of appeals squarely held that only the franchisor which had entered into the franchise agreement with the dealer could be held liable under the Act. *Id.* at 791.

[4] The court's unreported decision, which came to the attention of petitioner after the filing of the instant petition, is reprinted in the appendix hereto.

[5] H.R. 10310, 84th Cong., 2d Sess. § 3(a) (1956), reprinted in *Automobile Marketing Legislation: Hearings Before Subcomm. of the Comm. on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. 384 (1956).

medial purpose of the Act was limited to the core franchise relationship between an automobile manufacturer and its dealers, the court held that the Act could not be "stretched to cover finance companies, even when wholly owned by a manufacturer." *Id.* at 3, App. 3a.

As we noted in our petition, the Tenth Circuit's application of the Franchise Act to Ford Credit is also flatly inconsistent with the rulings of three other appellate courts that the Act does not extend to firms which are not parties to, or directly responsible for, the core manufacturer-dealer franchise relationship. *Marquis* v. *Chrysler Corp.*, 577 F.2d 624, 629 (9th Cir. 1978); *Stansifer* v. *Chrysler Motors Corp.*, 487 F.2d 59, 63-64 (9th Cir. 1973); *Lawrence Chrysler Plymouth, Inc.* v. *Chrysler Corp.*, 461 F.2d 608, 613 (7th Cir. 1972); *York Chrysler-Plymouth, Inc.* v. *Chrysler Credit Corp.*, 447 F.2d 786, 791 (5th Cir. 1971). *See also Joe Westbrook, Inc.* v. *Chrysler Corp.*, 419 F. Supp. 824, 831 (N.D. Ga. 1976).[6]

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[6] It is likewise clear that the Tenth Circuit improperly extended the Act when it ruled that the issue of whether Ford Credit was a firm which "acts for and is under the control of" an automobile manufacturer, so as to subject Ford Credit to the strict standards of the Act, was not a question for the jury. Colonial admits that the Tenth Circuit erected an irrebuttable presumption that any wholly owned subsidiary of an automobile manufacturer always acts as an agent for the manufacturer notwithstanding the facts of a particular case.

As described in Ford Credit's petition (pp. 21-27), the Tenth Circuit's ruling on the agency issue is flatly inconsistent with the clear terms of the Act, its legislative history, and the decisions of a number of other courts which have held—consistent with due process standards—that this issue constitutes a factual question which must be decided by the jury after a full review of the specific circumstances in each case. Colonial does not challenge or distinguish any of the authority cited in Ford Credit's petition on this point, and it remains an independent reason for issuing the requested writ.

Colonial's attempt to distinguish these decisions on the grounds that they do not involve credit subsidiaries is unavailing. The decisions clearly establish that a financial institution such as Ford Credit, which was never a party to the franchise agreement between a manufacturer and its dealer, cannot be held to the strict standards of the Franchise Act unless that non-party controlled the signatory to the franchise agreement and used it as a buffer to escape its own franchise obligations.[7]

Colonial has not even alleged, much less proven, that Ford Credit erected Ford Motor as a straw party to escape any such franchise obligations. To the contrary, it is undisputed that Ford Motor directly assumed all of its obligations as Colonial's franchisor and has been held to those obligations in this case.

Fourth, Colonial's all-encompassing definition of a "franchise" conflicts with the public policy behind the Act. Consider the diverse non-automotive businesses in which the subsidiaries of automobile manufacturers now engage. Ford Motor, for example, has subsidiaries involved in land development, insurance, and a wide range of non-automotive manufacturing. According to Colonial, whenever any of these subsidiaries enters

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[7] Colonial's reliance on a few cases in which the courts looked beyond the signatories to a franchise agreement to allow a *subsidiary of the franchisee* to maintain an action, or to hold the *parent of the franchisor* to the obligations of the Act, is equally invalid. *Brief in Opp.* at 19. In each of those cases, the courts confined the operation of the Act to parties directly responsible for the core manufacturer-dealer franchise relationship. None of the cases supports the Tenth Circuit's expansion of the Act to an independent credit relationship between a dealer and non-party to the franchise agreement where, as here, the franchisor-manufacturer is fully responsible for its franchise obligations.

into any type of agreement with an automobile dealer, the subsidiary's compliance with that agreement must be governed by the special standards of the Franchise Act.

As demonstrated above, both the clear terms and the legislative history of the Act permit no such result. As even Colonial admits, the Act was designed solely to remedy the perceived unequal bargaining power enjoyed by the few firms which manufacture automobiles over the many dealers dependent on the supply of those automobiles for their very existence.

Congress believed this unequal bargaining power justified the imposition of strict standards upon the manufacturer's performance of its franchise obligation to provide automobiles to its dealers. But Congress made no equivalent finding that the dealers were dependent on anything else, such as financing or non-automotive products, that the manufacturer or any of its affiliates might provide.

Colonial now attempts to rewrite this legislative history by asserting, without any supporting evidence, that "Ford dealers are dependent on Ford Credit for their financing." *Brief in Opp.* at 18. That, however, is simply not true. Approximately 40 percent of all Ford dealers operate their franchises without any financing whatsoever from Ford Credit. Indeed, that is precisely what Colonial did for some three years. And even when a dealer decides to use Ford Credit for its financing needs, it is no more dependent on Ford Credit than it would be on any alternative source of financing.

Congress mandated that the franchise relationship —and only the franchise relationship—should be gov-

erned by the strict standards of the Franchise Act, just as it was in this case. There is no valid reason to extend the Act to other commercial arrangements.

3. Extension of the Franchise Act Beyond The Core Automobile Franchise Agreement Would Be Anti-Competitive And Would Create Additional Burdens For The Federal Courts.

Although the decision below is clearly wrong, it is not a mere aberration which can be ignored. The practical consequence of the Tenth Circuit's decision is to subject the financial affiliates of automobile manufacturers to litigation under the special standards of the Act but to leave their competitors free of such constraints and expenses. It would be patently discriminatory and anti-competitive to put affiliates of automobile manufacturers under substantial handicaps that their rivals do not bear.

The Tenth Circuit's decision constitutes nothing less than the judicial creation of a new species of federal question litigation. Unless reversed, the decision would, for the first time, permit every automobile dealer to file a lawsuit in federal court to hold non-automotive affiliates of the dealer's manufacturer to the strict standards of the Franchise Act with respect to any goods or services procured from those affiliates. As we have demonstrated, this was not the purpose of the Act; and the federal courts certainly do not need this additional business.

CONCLUSION

The decision below extends the Franchise Act to independent credit arrangements between an automobile dealer and a financial institution. It does so even though the financial institution was never a party to the manufacturer's franchise agreement, and even

though the manufacturer is directly liable to the dealer for all of its franchise obligations. Colonial does not dispute that the Tenth Circuit's ruling has this effect. To the contrary, Colonial asserts that the Tenth Circuit was correct in extending the Act to all dealings between any subsidiary of an automobile manufacturer and an automobile dealer.

The Tenth Circuit's decision is flatly inconsistent with the clear terms and legislative history of the Franchise Act as well as the decisions of every court which had previously been asked to extend the Act in such a fashion. For the reasons set forth above and in our petition, we urge that the considerable ramifications of the Tenth Circuit's unduly expansive reading of the Act be reviewed by the Court.

Respectfully submitted,

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August 16, 1979